88-1269

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Petitioners,

v.

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, TAYCHEEDAH CORRECTIONAL INSTITUTION, NONA J. SWITALA, and CERTAIN UNNAMED DEFENDANT EMPLOYEES OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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34(p)

Respondents were served the initial Petition for Certiorari in Torres, et al. v. Wisconsin DHSS, et al., Docket No. 88-1046, on December 22, 1988.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the court erred in failing to defer to prison administrators judgment establishing regulations to

anticipate and prevent security problems as required by recent United States Supreme Court decisions?

2. Whether a bona fide occupation qualification ("BFOQ") plan can be found reasonably necessary on the basis of appropriate security regulations and attendant privacy problems?

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The en banc Opinion of the Court of Appeals for the Seventh Circuit is reprinted in the appendix to the initial petition (Initial Petition, A. 1a).

The panel Opinion of the Court of Appeals for the Seventh Circuit is reported at 838 F.2d 944, and is reprinted in the appendix to the initial petition (Initial Petition, A. 37a).

The Decision and Order of the United States District Court, Eastern District of Wisconsin, the Honorable Robert W. Warren presiding, is reported at 639 F. Supp. 2721, and is reprinted in the appendix to the initial petition (Initial Petition 68a).

JURISDICTION

Respondents rely upon the statement of jurisdiction in the initial petition.

STATUTE INVOLVED

Respondents rely upon the statement of the statute involved in the original petition.

SUPPLEMENTAL STATEMENT OF THE CASE

A. Facts and background.

Several critical facts have been omitted from the petitioners' statement of facts and both lower court opinions.[1] These facts relate to the respondents' security and privacy justification for the female sex BFOQ.

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[1]Facts recited in the en banc opinion are cited to the initial petition's appendix at the page where the fact is cited. Facts not found in the en banc opinion are cited to the trial record.

Taycheedah Correctional Institute's ("TCI") BFOQ plan was implemented to maximize security without unduly diminishing inmate privacy and impairing rehabilitation. (The rehabilitation prong is not the subject of this cross petition and, therefore, will not be discussed further.) The plan required at least one female correctional officer for each living unit.

The three residential buildings at TCI are set up similar to college dormitories in that the inmates reside in single, double or multiple occupancy rooms with wooden doors rather than cells with bars (A. 2a). However, TCI is a maximum (and medium and minimum) security prison. The inmates can be observed in their rooms through a clear glass window located in the wooden door at eye level. (Id.) The rooms contain beds,

dressers, toilets and wash basins. There are privacy curtains around the toilets in two houses. (Id.) Privacy cards were permitted for ten minute intervals to allow inmates to undress and change (A. 3a). The officers are not able to keep track of the time for which privacy cards are used in the multiple occupancy rooms. (Id.) Inmates have used the privacy cards to escape and to assault other inmates. (Id.) The privacy cards cannot be used on the inside at night when there are no male roving correctional officers in the house (A. 3a).

Each floor of the house has a shower and/or bathroom (A. 3a). Inmates must have permission to use the showers (A. 3a, 4a). They are allowed fifteen minutes. (Id.) Only inmates who are roommates may shower together. (Id.)

The showers and bathrooms have solid doors and the showers themselves have curtains. (Id.) Inmates in the shower or bathrooms cannot be observed from the hallway. (Id.)

The staffing pattern in the housing units has varied over the years depending on the level of security and other functions taking place in the house (Vol. 1 at 31-60, 68; Vol. 8 at 81-84; Vol. 9 at 72-73). In general, the lower the security status, the higher the correctional officer/inmate ratio. Thus, in the maximum security house, each floor is a complete living unit with its own correctional officer in charge, whereas, in the minimum house, there is only one correctional officer in the entire three floor unit on certain shifts (Vol. 1 at 33-60). In addition to other duties, the housing units sergeants were

responsible as either the living unit officer for the first floor or the living unit officer covering the entire building (Vol. 8 at 92; Vol. IX at 82-83). The sergeant was the last officer to ever be pulled from a house in order to meet other staffing shortages or to cover for emergencies (Vol. 9 at 82).

Defense experts with experience at the level of superintendent or security director all testified that observation is the key to security and that, therefore, each and every area in an institution must be observed (Vol. 9; Vol. 11 at 114-142). Effective surveillance incorporates both routine and random observations. (Id.) The post orders for the sergeant's posts and those for each post covering a living unit at TCI required routine and random surveillance of all areas of the housing

units, including inmate rooms and bathrooms and showers, whether occupied or unoccupied (Stipulated Exhibits 350-59). In addition, officers in living units conducted both routine and random frisk searches, random urine testing and, with authorization, strip searches (Vol. 8 at 93-103).

Correctional administrators also gave uncontradicted testimony about the security problems that mandated the continual observation of inmates; strongarming and other assaultive conduct, drug trafficking and usage, and violation of the institution's rules (Vol. 10 at 33, 40-42; Vol. 11 at 130). These experts also testified about the stradegems employed by male correctional officers to avoid invading female inmates' privacy and expressed their opinions as to the security risk

resulting from the males' natural desire to respect the females' bodily privacy (Vol. 9 at 42-44; Vol. 11 at 87).

The trial testimony of the petitioners was that they did not invade the inmates' privacy by being in the housing units because they did not look into the showers or the rooms where they were occupied. Indeed, one of the petitioners testified that he had not looked into an occupied bathroom once in five years (Vol. 1 at 175-76). Many of both male and female line officers who testified for the petitioners swore that they did not follow their post orders by observing all housing areas under their control (Vol. 1 at 175-76; Vol. 2 at 81-82, 220; Vol. 3 at 85, 87, 143, 207, 243; Vol. 4 at 83). The superintendent and all respondents' administrative experts opined that a

security risk was created as a result of a lack of observation.[2]

The trial court concluded and the appellate court affirmed the conclusion that the privacy of the inmates was not unduly invaded by the presence of male living unit officers because the male officers did not invade the inmates' privacy (A. 92a, 6a-8a). The trial court concluded that the security was not impaired by the presence of male officers because there were no specific complaints about the males job performance and, as the court of appeals noted, there was not any proven decline in inmate escapes or violence as a result of the BFOQ plan (A. 85-6a; 7a).

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[2]The Superintendent was unaware of the plaintiff's and other witnesses disregard of their post orders.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

Respondents have opposed the initial petition on numerous ground, among them, the ground that the Seventh Circuit's decision calls for a remand for further trial proceedings and, therefore, the case is not ripe for review at this time. Only if the court decides to grant the initial petition, are respondents asking this court to grant this cross-petition.

I. THE DECISION CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT HOLDING THAT THE FEDERAL COURTS ARE TO DEFER TO THE JUDGMENTS OF PRISON ADMINISTRATORS WITH REGARD TO SECURITY REGULATIONS THAT ANTICIPATE AND PREVENT SECURITY PROBLEMS.

All of the experts with experience administering prisons testified that observation is the touchstone of security

in a prison. Not suprisingly, the post orders for each of the areas designated as a living unit required that the officer in charge make continual routine and random observations of all areas inhabited by the inmates, whether occupied or unoccupied. This responsibility could not be carried out without substantial intrusion upon the inmates' bodily privacy. The penal experts with administrative experience agreed that a security risk exists if a male correctional officer is called upon to violate societal norms by peering into bathrooms or bedrooms in which opposite sex inmates may be partially clothed or engaged in bodily functions or conducting personal searches of these inmates. They testified that security is impared when inmates know that because male officers are on duty routine security precautions,

including body searches and observation, will be delayed or will not occur at all. These experts agree that the risk was minimized and security goals efficiently met by the deployment of same sex officers where such security tactics are required. By requiring one same sex officer for each post covering a living unit, the TCI BFOQ plan ensured that the essential security responsibilities were carried out safely and efficiently with the minimum possible invasion of the inmates limited privacy.

The petitioners asserted that they did not violate any privacy rights held by the inmates because they did not follow their post orders and observe the inmates in their rooms or in the baths or

showers.[3] Thus, when the petitioners were on the job, the inmates could rest assured that whatever they did in those areas, they would not be observed by these officers. The petitioners and their witnesses, both male and female line officers, gave their opinions that their violations of their post orders did not impair security. The superintendent, and all of the expert witness penal

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[3]The male officers were required to perform all observational security responsibilities although the administration had relieved them of responsibility for the performance of strip searches, pat searches and urine sampling. Since the petitioners relieved themselves of their duty to observe, there remained only the gatekeeper and paper shuffler functions. The petitioners' aspiration to such limited responsibilities in a maximum security prison is perhaps understandable, however, the prison administration cannot be expected to accommodate this limited function under the concept of administrative accommodation as it is obviously highly inefficient as well as inherently risky.

administrators who shouldered responsibility for establishing institutional security disagreed with the petitioners and maintained that the petitioners' failure to carry out their full employment duties created a security risk.

The well established rule is that federal courts should defer to the judgments of prison administrators on security regulations. The reasons for this deference are well known:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say

> that the problems of prisons in America are complex and intractable . . . .

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

Thus, the supreme court has said that the courts owe deference to prison administrators so that the "prison administrators . . . and not the courts, . . . make the difficult judgments concerning institutional operations." Turner v. Safley, 107 S. Ct. 2254, 2261 (1987). The deference principle applies to encourage prison administrators to "adopt innovative solutions to the intractable problems of prison administration." and to "anticipate" security problems. Id., O'Lone v. Estate of Shabazz, 107 S. Ct. 2400, 2405 (1987). A prison administrator does not have to prove the existence of a security risk by empirical evidence such as a

riot, a homosexual assault or a drug overdose, to benefit from the deference standard.[4] As with an airline, the prison administrator cannot be expected to establish the risk of accident or security lapse to a certainty ". . . for a certainty would require running the risk until a tragic accident would prove that the judgment was sound." (Citations omitted.) Western Air Lines v. Criswell, 105 S. Ct. 2743, 2754 (1985).

The decision's finding that the petitioners did not impair security by their disregard of their duty to observe, as set forth in their post orders, violated the court's responsibility to

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[4]Needless to say, the very ordinariness of the security procedures at issue in this case shows that they bear a rational relationship to the legitimate penological goal of promoting security. See also, Bell v. Wolfish, 441 U.S. 520 (1979).

accord deference to prison administrators' judgments on day to day security operations and to follow the principle that prison administrators do not have the burden of proving the correctness of their security decisions by proof of tragic consequences.

Had the court properly applied these deference principles, it would have been compelled to conclude that the institutional security goals could not be safely and efficiently carried out by petitioners unless petitioners changed their behavior and routinely violated the inmates privacy by observing them as they engaged in personal bodily activities and, concomitantly, that the inmates' privacy interests would be protected from constant invasion by the petitioners only at the expense of the institutions' and their own legitimate security interests.

The court's failure to accord the administrative judgments regarding institutional security risks any deference is in direct conflict with all supreme court cases that establish that such deference should be accorded.

II. THE DECISION CONFLICTS WITH DECISIONS OF THE VARIOUS CIRCUITS WHICH HOLD THAT THE FINDINGS OF FACT MUST COVER ALL MATERIAL ISSUES RAISED IN A DEFENSE.

For the factfinding requirements of Rule 52(a) to be met, "the findings of fact on the merits [must] include as many of the subsidiary facts as are necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue." Denofre v. Transp. Ins. Rating Bureau, 532 F.2d 43, 45 (7th Cir. 1976). Findings of fact must be clearly set forth, separate, specific, and

complete. Fuchstadt v. United States, 434 F.2d 367, 370 (7th Cir. 1970). Findings of fact must cover all the material issues raised by the claims or the defenses presented. Otero v. Mesa Cty. Valley Sch. Dist. No. 51, 568 F.2d 1312, 1316 (10th Cir. 1977). The findings in this case conflict with all of these decisions.

The decision ignores evidence in three areas: (1) uncontradicted evidence of the nature of the security functions entailed in the post orders for the housing posts requiring routine and random surveillance of the residence bathroom and showers, whether occupied or unoccupied and the inherent invasion of privacy in their performance; (2) expert testimony by all of the prison administrators who testified establishing the critical nature of the constant

presence of staff to perform random and routine search and surveillance measures at issue; and (3) the same testimony establishing the risk to security resulting from the deployment of male correctional officers in the housing units because of the male officers' natural desire to respect an inmate's bodily privacy.

The decision's lack of consideration of this body of evidence together with the lack of any deference to the prison administrator's security decisions creates a precedent that clashes with principles established by the supreme court and the various circuits for federal adjudication of cases occurring in the prison setting.

III. THE DECISION CONFLICTS WITH TITLE VII BECAUSE IT DEPRIVES THE PRISON ADMINISTRATOR OF TOOLS THAT ARE REASONABLY NECESSARY TO MAXIMIZE THE GOALS OF INSTITUTIONAL SECURITY AND PRIVACY.

The deference principles recited in the first portion of this brief reflect the supreme court's recognition of the fact that because prison administrators face awesome challenges and, federal judges have neither experience running prisons nor accountability for prison operations, caution on the part of a federal judge reviewing a prison administrator's judgment is warranted. This federal policy encourages penal administrators to implement those regulations that are necessary to enhance their ultimate goal of creating a secure, dignified and rehabilitative environment.

The supreme court has not finally determined whether inmates retain any

privacy rights and certain recent decisions suggest that only the most limited privacy rights remain. See Hudson v. Palmer, 468 U.S. 517 (1984). In addition, at least one court has held that inmates have no constitutional privacy rights. Griffin v. Michigan Dept. of Corrections, 654 F. Supp. 690 (E.D. Mich. 1982). However, the Seventh Circuit has held that inmates are not entirely without constitutional protections against invasions of their privacy by members of the opposite sex. Smith v. Fairman, 678 F.2d 52 (7th Cir. 1982). In addition, the courts have recognized that a BFOQ that protects inmates from opposite sex touching or observation may enhance the atmosphere in a prison by promoting feelings of dignity and self-worth and minimizing the resentment that accompanies the necessary

intrusions. Id., Gunther v. Iowa State Men's Reform., 612 F.2d 1079, cert. den., 446 U.S. 966 (8th Cir. 1980). Forts v. Ward, 471 F. Supp. 1095 (S.D. N.Y. 1979), vacated in part, 621 F.2d 1210 (2nd Cir. 1980). The courts have recognized that correctional interests in establishing a positive, dignified rehabilitative atmosphere can provide a basis for administrative actions protective of inmates' privacy independent of the inmates' constitutional rights to privacy: see Hudson v. Goodlander, 494 F. Supp. 893 (D. Md. 1980); Forts v. Ward, 621 F.2d 1210, 1216, n.10.

This decision undermines the prison administrators' ability to maximize the essential security and dignity components of the prison atmosphere simultaneously. It violates the federal principles of comity and deference as

they are set forth in supreme court and various federal cases and denies the State of Wisconsin the right to determine the mission that its prisons will serve. The state's and the prison administrator's goal of promoting a secure and dignified setting have taken a back seat to the male guards employment interests. Respondents respectfully submit that this result is in direct conflict with Title VII as well as recent supreme court cases involving adjudication of prisons regulations.

CONCLUSION

The lower court decision errs in that it fails to accord the prison administrator's security and day to day operational decisions any of the deference which this court and the other circuits have found to be appropriate. The court has denied this administrator the judicially identified right to anticipate and prevent security problems. The decision substitutes the judgment of the court (and that of the line officers) for that of the prison administrator solely because the administrator did not prove, by incidents occurring on the petitioners' shift, that their security concerns were correct. Thus, the decision exacts a standard of proof at odds with the supreme court's recognition that rational

security regulations aim to anticipate and prevent security lapses, not merely react to such lapses.

The decision at issue deprives this administrator of any ability to establish a legitimate BFOQ based on institution security regulations embodied in post orders because it accorded no recognition, much less deference, to the effective post orders. The decision gave the male officers' employment rights precedence over those essential functions which caused the authorities to implement a BFOQ, i.e., to duty to promote the

security and rehabilitation objectives of the prison in an atmosphere of control, order and dignity.

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RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION

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QUESTIONS PRESENTED

1. Whether this case is ripe for review.

2. Whether the heavy burden of establishing a bona fide occupational qualification ("BFOQ") defense imposed on an employer seeking to come within the BFOQ exception to Title VII should be relaxed in cases involving BFOQ plans created and implemented by prison administrators to such an extent that the prison administrator's decision to discriminate per a BFOQ is entitled to deference.

3. Whether this Court should review the findings and conclusions of the District Court judge, the panel of the Seventh Circuit, and the Seventh Circuit *en banc*, to the effect that the BFOQ Plan in question was not justified on privacy or security grounds.

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The *en banc* Opinion of the Court of Appeals for the Seventh Circuit is reported at 859 F.2d 1253, and is reprinted in the appendix to the initial Petition for Certiorari filed in *Torres, et al v. Wisconsin DHSS, et al,* Docket No. 88-1046 ("initial Petition"), pp. 1a-36a.

The panel Opinion of the Court of Appeals for the Seventh Circuit is reported at 838 F.2d 944, and is reprinted in the appendix to the initial Petition, pp. 37a-67a.

The Decision and Order of the United States District Court, Eastern District of Wisconsin, the Honorable Robert W. Warren presiding, is reported at 639 F.Supp. 271, and is reprinted in the appendix to the initial Petition, pp. 68a-94a.

JURISDICTION

The Cross-Respondents rely on the statement contained in the initial Petition, pp. 1-2, as well as on the Cross-Petitioners' statement that they were served with said initial Petition on December 22, 1988.

STATUTE INVOLVED

The Cross-Respondents rely on the recitation of the statute involved contained in the initial Petition, p. 2.

STATEMENT OF THE CASE

A. Facts and Background.

The Cross-Respondents rely on the detailed and complete factual recitations contained in the Decision and Order of Judge Warren (appendix to initial Petition ("A"), pp. 69a-81a), and in the panel Opinion of the Seventh Circuit (A, pp. 39a-45a), as well as on the Statement of Facts contained in the initial Petition, pp. 3-6. As such, the Cross-Respondents will not burden this Court with a re-recitation of the facts here.[1]

B. Decisions Below.

The decisions below are all contained in the appendix to the initial Petition, pp. 1a-94a. All that need be said with respect thereto insofar as the Cross-Petition is concerned is that the District Court judge, all three judges on the Seventh Circuit panel, and every judge sitting on the Seventh Circuit *en banc*, all reached the conclusion that the Cross-Petitioners failed to meet their heavy burden of justifying their BFOQ Plan on privacy and security grounds.

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[1] It is the position of the Cross-Respondents that the "Supplemental Statement Of The Case" contained in the Cross-Petition, pp. 2-9, is not entirely accurate and, as expected, is slanted toward the Cross-Petitioners' position. However, the Cross-Respondents will not address this at the certiorari stage of these proceedings, believing first that such issues should be addressed if and when the case is addressed on the merits, and believing second that the trial court record as reflected in the District Court Decision and Order and in the panel Opinion speaks for itself.

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

I. THE CROSS-PETITION CANNOT BE GRANTED IF THE INITIAL PETITION IS DENIED.

Supreme Court Rule 20.5 provides that no cross-petition which would otherwise be untimely shall be granted unless a timely petition for a writ of certiorari of another party to the case is granted. Inasmuch as the Cross-Petition, in order to be timely in and of itself, would have had to have been filed by January 15, 1989, but was not filed until January 18, 1989, and was not docketed until January 20, 1989, said Cross-Petition would not otherwise be timely and cannot be granted should the initial Petition be denied.

II. THE LEGAL ISSUES RAISED IN THIS CASE ARE RIPE FOR REVIEW.

The Cross-Petitioners contend on page 10 of their Cross-Petition that this case is not ripe for review, and then subsequently argue that the Seventh Circuit *en banc* erred in not applying the prisoners' rights deference standard contained in *Procunier v. Martinez*, 94 S.Ct. 1800 (1974) and successor cases to this Title VII BFOQ case with respect to their privacy and security justifications for the BFOQ Plan.

It is the position of the Cross-Respondents that it is this precise issue, whether a deference standard is to be applied to a prison employer's decision to discriminate per a BFOQ, which makes this case ripe for review. The Seventh Circuit, *en banc*, in its Opinion did not apply the traditional BFOQ burden of proof with respect to the Cross-Petitioners' rehabilitation justification for the

BFOQ Plan, that being to impose a heavy burden on them to justify said Plan as reasonably necessary, but rather deferred to their decision to discriminate, holding that their discrimination based merely on a theory was entitled to substantial weight. As a result of that holding, the *en banc* Opinion is in conflict with case law from other circuits and with Supreme Court precedent, rendering it erroneous.[2]

It is respectfully submitted, then, that the *en banc* Opinion raises legal issues which must be addressed head-on at this juncture, prior to remand. A decision by this Court that the deference standard was improperly applied by the *en banc* court would most certainly result in an affirmance of the District Court's judgment, thus eliminating the necessity for the District Court and the parties to expend time and resources introducing evidence on the rehabilitation issue and redetermining the same. More importantly, the fact that the correctness of the *en banc* Opinion with respect to its new, novel, and unprecedented legal standard is in doubt, and the potential adverse affects should it be allowed to stand insofar as other courts, both state and federal, adopting said erroneous legal standard, dictate that the legal issues be

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[2] As will be discussed later in this Brief, it is the position of the Cross-Respondents that the Seventh Circuit, in its *en banc* Opinion, properly did not defer to the judgment of the Cross-Petitioners to discriminate on the basis of sex on privacy or security grounds. It is also the position of the Cross-Respondents, as will be later addressed in this Brief, that the *en banc* court properly affirmed the District Court's findings and conclusions that the Cross-Petitioners failed to justify their BFOQ Plan on privacy or security grounds.

addressed now. This case is most certainly ripe for review.

III. THE *EN BANC* COURT PROPERLY DID NOT DEFER TO THE PRISON ADMINISTRATOR'S DECISION TO DISCRIMINATE PER A BFOQ PLAN BASED ON PRIVACY AND SECURITY GROUNDS.

A. Under The Applicable BFOQ Burden Of Proof Standard, An Employer Seeking To Come Within Said Exception To Title VII Has A Heavy Burden To Meet.

The BFOQ exception to Title VII provides only the narrowest of exceptions, as is illustrated by the various formulations of said exception by the courts. *Dothard v. Rawlinson*, 97 S.Ct. 2720, 2729 (1977). Although in the mine-run case the burden of establishing a *prima facie* case of sex discrimination rests with the plaintiff in a Title VII action, where, as here, the employer relies on the BFOQ exception to Title VII to justify overt discrimination, a *prima facie* case of sex discrimination is established by that reliance. *Harden v. Dayton Human Rehabilitation Center*, 520 F.Supp. 769, 777 (S.D. Ohio 1981), *aff'd* 779 F.2d 50 (6th Cir. 1985). The burden then shifts to the discriminating employer to establish that its overtly discriminatory employment practices fall within the BFOQ exception which burden, because of the extreme narrowness of the exception, is a very heavy one. *Fesel v. Masonic Home of Del. Inc.*, 447 F.Supp. 1346, 1350 (Del. 1978), *aff'd* 591 F.2d 1334 (3rd Cir. 1979); *Griffen v. Michigan Dept. of Corrections*, 654 F.Supp. 690, 700 (E.D. Mich. 1982). This heavy burden is illustrative of why the BFOQ exception is justified only in rare, appropriate circumstances. *Manley v. Mobile County, Ala.*, 441 F.Supp. 1351, 1357 (S.D. Ala.

1977); 110 Cong. Record 7213 (1964); H.R. Rep. No. 914, 88 Cong. 1st Session (1963).

B. To Defer To The Decision Of The Employer To Discriminate Under The Guise Of A BFOQ Directly Conflicts With The Applicable BFOQ Burden Of Proof Standards.

In Arguments I and III of their Cross-Petition, the Cross-Petitioners refer to their discriminatory employment policy as a "security regulation", and then argue that deference is to be accorded to said discriminatory employment policy per the deference standard contained in the prisoners' rights line of cases.[3] However, the Cross-Petitioners mischaracterize their discriminatory employment policy as a "security regulation"; it was and remains solely an employment policy, and is governed by the strictures of Title VII and the applicable BFOQ exception and standards.[4] Accordingly, the deference standard suggested by the Cross-Petitioners is inapplicable with respect to the discriminatory employment policy (BFOQ Plan) in question, as will next be discussed.

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[3] In footnote 4 on page 16 of the Cross-Petition, the Cross-Petitioners contend that the "security procedures" bear a rational relationship to the legitimate penological goal of promoting security. However, as Judge Easterbrook noted in his dissent, a rational basis is *not* sufficient when an employer, such as the Cross-Petitioners here, seeks to fall within the BFOQ exception - rather, the applicable standard is reasonable necessity. (A, pp. 29a-30a, 35a).

[4] For the Cross-Petitioners to contend that the basis for their discriminatory employment policy was security is contrary to their own policy documentation contained in the

(Continued on following page)

Initially, it is to be noted that the deference principles in question have *never* been applied in a Title VII corrections action. This is illustrated by the fact that the Cross-Petitioners have not cited a single Title VII case in which the deference principles were applied; rather, all of the cases cited by the Cross-Petitioners in support of the deference principle are prisoners' rights cases.

Second, in the only prison-sex BFOQ case to ever be addressed by the United States Supreme Court, *Dothard, supra,* this Court did not defer to the decision of the prison administrator to discriminate per a BFOQ, but rather applied the relevant BFOQ burden of proof standards in reaching its result.[5]

The application of deference principles to a Title VII BFOQ action also directly conflicts with this Court's decision in *Western Airlines v. Criswell,* 105 S.Ct. 2743 (1985). In *Criswell, supra,* this Court held that deference to an employer's choice of job restrictions was at odds with

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record. See Stipulated Exhibit 440, a June 20, 1980, memorandum from Larry Tainter, Chief of the State of Wisconsin Bureau of Personnel and Employment Services, Personnel and Administrative Services, to Elmer Cady, Administrator of the State of Wisconsin Division of Corrections, in which it was stated that the authority to establish BFOQ positions could be based only on the need to protect inmate privacy, and could not be based on security concerns. (Brief Appendix, pp. 1a-4a).

[5] Both Judge Cudahy and Judge Easterbrook noted, in their respective dissents, that the *en banc* court's deference approach cannot be recorded with *Dothard, supra.* (A, pp. 26a, 34a-35a).

Congress' decision in adopting acts such as Title VII and the ADEA to subject such management decisions to a test of objective justification in a court of law. *Id.*, at p. 2754.[6]

Lastly, with the exception of the *en banc* Opinion, every other circuit which has addressed the issue of the appropriateness of a BFOQ for a prison guard position has found that sex was *not* a BFOQ for said position(s). See *Harden, supra; Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *Forts v. Ward*, 621 F.2d 1210 (2nd Cir. 1980); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980), *cert. den.* 100 S.Ct. 2942 (1980).[7] In fact, it has been generally recognized that in the absence of unusual circumstances such as existed in *Dothard, supra*, federal courts have been unwilling to characterize sex as a BFOQ for the position of correctional officer. See e.g. *Reynolds v. New York Dept. of Corr. Serv.*, 568 F.Supp.

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[6] See the dissent of Judge Easterbrook, A, pp. 34a-35a.

[7] On pages 22-23 of the Cross-Petition, the Cross-Petitioners contend that the courts in *Gunther, supra*, and in *Forts v. Ward*, 471 F.Supp. 1095 (S.D. N.Y. 1979), vacated in part, 621 F.2d 1210 (2nd Cir. 1980), recognized that a BFOQ which protects inmates from opposite-sex touching or observation may enhance the atmosphere in a prison by promoting feelings of dignity and self-worth and minimizing the resentment which accompanies the necessary intrusions. It is critical to note, however, that the court in *Gunther, supra*, upheld a district court decision finding that the employer failed to meet its burden of establishing BFOQs, and that the district court in *Forts, supra*, found that sex was not a BFOQ for the prison guard position. *Id.*, at p. 1099.

747, 749 (S.D. N.Y. 1983).[8] Notwithstanding the above line of cases, the effect of the deference principles contained in the *en banc* Opinion is to say that sex may be a BFOQ for every female prison, and maybe every prison, in America, as stated by Judge Easterbrook in his dissent. (A, p. 31a).

In conclusion, then, for the reasons stated above and stated in the initial Petition, the deference principles in question are not applicable to a Title VII action, and the decision of a prison employer to discriminate under the guise of a BFOQ is not entitled to deference. Obviously, to adopt and utilize such deference principles in a Title VII action would result in the narrow BFOQ exception swallowing the strong Title VII prohibition against sex discrimination. Rather, any employer, including a prison employer, seeking to discriminate per a BFOQ must meet its heavy burden of justifying its discrimination or pay the price of Title VII liability.[9] In this case, the Cross-Petitioners did not meet their heavy burden, as will be addressed in the next argument.

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[8] Note that in the Federal Women's Prison in Alderson there are no "BFOQ" positions which could only be held by female staff. (See Stipulated Exhibit 613).

[9] To require deference to the decision of the employer to discriminate per a BFOQ would, in effect, totally emasculate the "heavy burden" currently imposed on such an employer. Rather than the discriminating employer being required to meet a heavy burden, its decision to discriminate would instead be deferred to in the first instance, shifting the burden to the innocent employee to establish the unlawfulness of the discrimination. This is, obviously, contrary to the currently existing BFOQ standards. See Judge Cudahy's dissent, A, pp. 23a-25a.

IV. THE DISTRICT COURT, PANEL, AND *EN BANC* COURT ALL CORRECTLY HELD THAT THE CROSS-PETITIONERS FAILED TO ESTABLISH THE VALIDITY OF THEIR BFOQ PLAN ON PRIVACY AND/OR SECURITY GROUNDS; ACCORDINGLY, THERE IS NO NEED OR BASIS FOR REVIEWING THE SAME.

An appellate court is bound by F.R.C.P. 52 to accept a district court's findings of fact unless clearly erroneous. This includes the ultimate factual issue in a Title VII action, the finding of intentional discrimination. *Andre v. Bendix Corp.*, 774 F.2d 786, 793 (7th Cir. 1985); *Anderson v. City of Bessmer City, N.C.*, 105 S.Ct. 1504, 1511 (1985). A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence before it is left with a definite and firm conviction that a mistake has been committed. *Anderson, supra*, at p. 1511.

In the present case, the District Court judge personally inspected the prison facilities thoroughly on the first day of trial, listened to the testimony of all witnesses over the course of a three week court trial, and received into evidence numerous documents concerning the issues in question. The District Court subsequently issued its Decision and Order, which demonstrated a thorough weighing of all of the evidence, including the credibility of witnesses, a recitation of factual findings, an application of the relevant Title VII and BFOQ law and standards to said factual findings, and the reaching of the ultimate factual conclusion that the TCI BFOQ Plan was not justified on rehabilitation, privacy, or security grounds.

The panel of the Seventh Circuit which heard the appeal affirmed the District Court's judgment on a 2-1

vote, the majority finding that there was no distinct security justification for the BFOQ Plan, that TCI was operated in a way that was very sensitive to the privacy interests of its inmates and afforded them a good deal of privacy from correctional officers of both sexes such that the BFOQ Plan was not justified on a privacy basis, and that the rehabilitation theory also did not justify the BFOQ Plan in question. (A, pp. 49a, 52a, 55a-57a, 59a). Although the dissenting judge, Judge Ripple, disagreed with the majority opinion on the rehabilitation issue, he did not in any way disagree with the majority findings concerning privacy and security. (See A, p. 60a).

The *en banc* court also concurred with the District Court, and the panel, with respect to the issues of privacy and security, holding that the decision of the District Court that the BFOQ Plan could not be justified on a privacy or security basis was correct in law and fact. (A, p. 12a).

It is clear, then, from a review of the opinions of the District Court, the panel, and the *en banc* court that they are completely in accord that the application of the relevant BFOQ principles to the facts of this case dictates finding that the Cross-Petitioners failed to meet their heavy burden of justifying their BFOQ Plan on a privacy or security basis. Inasmuch as the factual basis for said findings is well-established, and further inasmuch as the legal basis for said findings, the application of the relevant BFOQ law and standards to the facts instead of the application of a deference standard, is grounded in well-settled law, there is no legal or factual basis on which this Court should review the *en banc* Opinion with respect to its privacy and security conclusions.

Rather, the only issues before this Court are whether rehabilitation can serve as the basis for the Cross-Petitioners' BFOQ Plan, whether a deference standard is to be applied to a prison employer's decision to discriminate per a BFOQ Plan instead of requiring said employer to meet the traditional BFOQ "heavy burden", and whether a BFOQ can be established on the basis of an employer's opinion or belief, without the need for the introduction of objective evidence.[10] All of the above issues have been addressed in detail in the initial Petition and will not be re-addressed here. Suffice it to say that the Cross-Respondents respectfully urge this Court to grant their initial Petition with respect to said issues, and deny the Cross-Petition for the reasons contained herein.

CONCLUSION

The Cross-Respondents agree with the Cross-Petitioners that this Court should decide the issue of which standard applies to a discriminatory employment policy implemented by a prison employer and denominated "BFOQ" – the deference standard contained in the prisoners' rights line of cases, or the traditional BFOQ standards applied in all prison-sex BFOQ cases to date. In fact, the Cross-Petition is indicative of the confusion which will exist as a result of the *en banc* Opinion when a prison employer, or another employer traditionally

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[10] See footnote 4, *infra*, in which it is indicated that privacy was the only basis on which a BFOQ Plan could be established. Query whether an *ex post facto* justification for the BFOQ Plan such as rehabilitation can serve to validate the same.

deferred to, discriminates per a BFOQ – is that decision deferred to, or does the employer have to meet a heavy burden to justify the discrimination.

The *en banc* Opinion, insofar as it applies the deference standard, is currently in conflict with Supreme Court precedent and all other circuits which have addressed prison-sex BFOQ cases. It has indeed created a "prison exception" to the applicable BFOQ law and standards (A, pp. 26a, 31a, 34a), which exception could easily be extended to other employers to whom deference is typically accorded. (A, pp. 26a-27a). Therefore, the Cross-Respondents' initial Petition should be granted and the *en banc* Opinion reversed as requested therein. However, inasmuch as the *en banc* Opinion was both legally and factually correct with respect to security and privacy as discussed in this Brief, there is no need to review the same and the Cross-Petition should be denied.

In sum, then, the Cross-Respondents respectfully request that their initial Petition be granted, and that the Cross-Petition be denied.

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Date: February 16, 1989

June 20, 1980

To: Elmer Cady, Administrator
Division of Corrections

From: Larry Tainter, Chief
Personnel & Administrative Services
Bureau of Personnel & Employment Relations

Subject: Requests from DOC Institutions for Approval of Bona Fide Occupational Qualifications (BFOQ's)

In a recent meeting between representatives of our Bureau, Legal Counsel, and the Bureau of Institutions, at which requests for BFOQ's from DOC institutions were considered, it became apparent that there are significant differences in the way situations involving resident privacy are treated. As a result of our discussions of these differences, it was agreed that no more BFOQ requests should be considered until the issues raised by these differences are addressed. As a result of this agreement, we are returning the requests submitted by Oakhill, Ethan Allen, and Fox Lake, to the Bureau of Institutions for reconsideration in light of the issues discussed below.

Specifically, in considering the request of Ethan Allen School, it appeared that the pattern of BFOQ's requested was significantly different then that approved for Lincoln Hills School, even though these institutions have a similar resident population and have a similar arrangement of living units. Another inconsistency appears in the fact that the Oakhill Correctional Institution has requested BFOQ's for segregation and visiting posts, while the Kettle Moraine Institution has requested none though they

also have visiting and segregation posts, which presumably, function in a similar way. Lastly, the Fox Lake Institution has requested BFOQ's for at least one position in each housing unit, while the Kettle Moraine Institution, which houses residents of the same security level (who presumably are thus subject to a similar degree of supervision) and has similar bathroom/toilet arrangements, has requested no BFOQ's. These disparities, as the Bureau of Institutions representatives agree, are difficult to explain.

The fact that there is a wide disparity among the institutions as to the number and post location of the BFOQ's tends to put requests for extensive use of BFOQ's in a questionable light, and raises the issue of whether alternative methods of job structuring could assure equal employment opportunity as well as protecting resident's rights to privacy. The disparity also would tend to weaken the defense of our utilization of BFOQ's should the issue be brought to the courts, and appears to indicate significant variation among the institutions in dealing with a resident's right to privacy.

An additional problem that has arisen is the relation of BFOQ's to institution security. As you may know, the authority to establish BFOQ's can be based only on the need to protect resident privacy. Thus, BFOQ's are not a vehicle for avoiding the issue of the strength or physical abilities needed to ensure the security of residents. Some institutions appear to feel that perceived security needs can be part of the justification for BFOQ's. Conceptually, however, the sex of the employe, in itself, is only related to the need to ensure privacy, and not to the need for certain physical abilities to be used to maintain security.

When developing requests for BFOQ's, institution personnel should keep this conceptual distinction firmly in mind.

In our request to the Department of Employment Relations for authority to establish BFOQ's, three paradigm cases are discussed: bathroom/shower supervision posts, single coverage posts in living units, and posts in segregation or adjustment units where strip searches or other exposure to unclothed residents is a significant part of the posts' responsibilities. In addition, BFOQ's have been granted for transportation assignments requiring constant supervision of the resident(s) being transported, to ensure that restroom stops can be supervised without violation of resident rights to privacy. Since, presumably, all institutions have posts which involve these functions, though in various ways, it is difficult to understand the diversity of the BFOQ requests. As we agreed with Mr. Kolb and Mr. Stehling, we feel that a Division-wide policy on resident privacy addressing the methods and extent of supervision given to residents in situations in which privacy is an issue, should be formulated and applied before we can consider further requests for BFOQ's.

I would be glad to discuss these issues with you, and to provide assistance to you and your Division to formulate a consistent BFOQ policy. I would also be happy to

discuss these problems with the Institution Superintendent if you feel this would be productive.

LT/mkd

cc: Ken DePrey
Ken Nachreiner
David Whitcomb
Robert Ellsworth
Darrel Kolb
Fred Stehling